NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 17 | Issue 1 Article 7

2000

Financial Privacy

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INTRODUCTION

Thank you for inviting me to speak on behalf of the American Civil Liberties Union[1] about financial privacy and the Financial Services Modernization Act.[2] I was one of the of people who lobbied Congress for the broadest possible privacy protections in that legislation, and I hope to contribute to the panel discussion something of a report from Washington.

I. FINANCIAL PRIVACY AND FAIR INFORMATION PRACTICES

Privacy advocates came together in an "odd bedfellows" coalition to oppose the Financial Services Modernization Act — it was re-named at final passage, the "Gramm-Leach-Bliley Act" ("G-L-B"). We argued that the bill threatened consumer privacy. It did this by removing the walls that separate the business of insurance companies, banks and securities firms; and thus, facilitated the flow of personal financial information among them.[3] These walls had afforded de facto privacy protection. The limited privacy provisions in the bill did not go far enough to replace the protection that they provided.

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[1] The ACLU is a nation-wide, non-profit, non-partisan organization of over 250,000 people dedicated to protecting the principles of freedom set forth in the Bill of Rights.

[2] Graham-Leach-Bliley Act, Pub. L. No. 106-102.

[3] The ACLU took no position on the merits of the financial modernization legislation overall, and whether in particular, insurance companies, banks, and the securities firms should be able to affiliate more readily. Instead, we argued that if the legal walls separating these businesses were to be removed, they ought to be replaced with privacy rights that would allow consumers to control the flow of their personal information among the affiliated entities.

Believe me, when the ACLU, the Eagle Forum, the Free Congress Foundation and Ralph Nader all agree on something, it is time to stand up and take notice. The coalition came together around four principles of fair information practices:

- ***Notice*** as to what personal financial information is being collected;
- ***Access*** to the information to ensure accuracy;
- ***Control*** over dissemination of the information; and
- ***Non-pre-emption*** of state laws that provide superior financial privacy protection.

We have been advocating these principles for some time. They reflect what could be called the Golden Rule of informational privacy: sensitive personal information given for one purpose ought not be used for other purposes without the express consent of the person to whom the information relates.

II. PRIVACY PROTECTION IN THE LEGISLATION

Congressional debate on the privacy provisions in the Gramm-Leach-Bliley Act was extensive, heated and divisive. Regarding the provisions, Rep. Sue Kelly (R-NY) said: " . . . [T]his legislation represents the greatest expansion of personal financial privacy in the history of American finance. . .."[4] Contrarily, Rep. John Dingell (D-MI) commented: ". . . the privacy protections in [G-L-B] are at best a sham. . .. The only thing the banks are going to be required to . . . do with regard to your privacy — and this is everything, from your health to your financial situation to everything else — is say 'we are going to stick it to you.' Consumers, investors and the American public will have no protection [of] their privacy whatsoever under this bill."How could Ms. Kelly's "greatest expansion of personal financial privacy in . . . history" be Mr. Dingell's privacy sham? Because, the legislation,

[4] 145 CONG. REC. H11513 (November 4, 1999) (statement of Rep. Sue Kelly).

while allowing consumers to "opt-out" of most sharing of non-public personal information with unaffiliated third parties, made the opportunity to opt-out less useful for consumers. It did this by allowing affiliations among entities that used to be unaffiliated. These include entities that collect the sensitive personal information a consumer would want to protect the most; as well as entities that offer, or deny, critically important services to consumers. In other words, G-L-B's privacy provisions are almost illusory. The Act tears down the walls that separate insurance companies, banks and the securities industry, but its privacy provisions fail to regulate the movement of personal financial information among those companies, because they would be affiliates.

Many in the financial services industry argued that the legislation imposed privacy protections where before there were none. This, they argued, meant that the legislation was an improvement over the status quo. But, in reality, the status quo was not an option in the context of this legislation. Facilitating the creation of new financial services conglomerates was at the very heart of the bill. Moreover, the status quo, with respect to privacy, is not an option for society in general. Advances in technology have taken the status quo off the table. Where yesterday, collecting and sharing vast amounts of personal financial information was time-consuming, expensive, and impractical for a bank, today it can be done at point and click speed. In addition, there is arguably a greater financial incentive to share the information today than there was in the distant past.

III. PROTECTION OF FINANCIAL PRIVACY IN EXISTING LAW[5]

Financial privacy was protected, to a limited degree, prior to the Gramm-Leach-Bliley legislation by a mix of state constitutional provisions, laws and regulations, and by the federal Fair Credit

[5] Much of the discussion in this section is based upon, L. RICHARD FISCHER, THE LAW OF FINANCIAL PRIVACY, (Warren, Gorham & Lamont Banking/A.S. Pratt & Sons Group, 1998) (on file with author).

Reporting Act (FCRA).[6] The FCRA regulates, to some extent, the dissemination of financial information by some private businesses. It allows credit-reporting agencies to disseminate information about a person's credit, without consent, for a wide variety of purposes, and gives consumers access to their credit reports to promote accuracy. The FCRA also provides consumers access to information about those who requested a credit report, and a process for settling disputes about report accuracy.

In addition to the consumer protection laws, financial privacy protections at the state level fall generally into three categories:

> 1. **State constitutional privacy provisions.** These provisions are occasionally interpreted to bar the sale, exchange or dissemination of non-public personal financial information. For example, the California Supreme Court in *Valley Bank of Nevada v. Superior Court,* interpreted the state privacy guarantee[7] to require a financial institution to notify its customer and afford him an opportunity to object before it could turn over the customer's financial information to a third party in connection with discovery in a civil case.[8] However, most state constitutional privacy guarantees are likely to be interpreted as providing protection only with respect to activities of the government, not the activities of private parties.
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> 2. **State common law.** Plaintiffs sometimes cite state common law — particularly as it relates to invasion of privacy, defamation, and implied contract — to protect their financial privacy. However, tort claims based on invasion of privacy and defamation are seldom successful because mere disclosure of

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[6] Fair Credit Reporting Act, 15 U.S.C. § 1681 (1971).

[7] CAL. CONST. art. I, § 1 (Adopted in 1974, this amendment elevated the right to privacy to an "inalienable right").

[8] Valley Bank of Nevada v. Superior Court, 542 P.2d 977 (Cal. 1975).

confidential information seldom satisfies the elements of the tort. For example, evidence that the information disseminated was true is a complete defense to a defamation claim.[9] Customers argue, with slightly more success, that banks have an implied agreement with their customers to keep their financial information confidential. For example, in *Peterson v. Idaho First National Bank,* the Idaho Supreme Court found that disclosure of the customer's deteriorating finances to his employer violated an implied contract between the bank and its customer that no such information be disseminated without authorization.[10]

3. **State financial privacy laws.** Most state financial privacy laws govern only disclosure to state governmental entities. But, for example, Connecticut, Illinois, Maine, and Maryland financial privacy laws cover disclosure of certain financial information to any person.

All of these protections have proven insufficient in the information age.

IV. FINANCIAL PRIVACY PROTECTIONS IN THE GRAMM-LEACH-BLILEY ACT

G-L-B does not require financial institutions to allow consumers to opt out of sharing their personal information with affiliates. It does require financial institutions to inform consumers of the institution's privacy policies, and give consumers an opportunity to opt-out of sharing their personal financial information with third parties. I call it a "presumed consent" statute: if the consumer takes no action, there is a presumption that the consumer consented to the

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[9] RESTATEMENT (SECOND) OF TORTS § 581A.

[10] Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (Idaho 1961).

sharing of their personal information with third parties. This stands in stark contrast to a "true consent" statute: the consumer's express consent must be received before personal financial information is shared. Financial institutions argued that a true consent statute would be unworkable, and would deny financial institutions the synergies that the legislation promised. Though, almost simultaneously, Citibank — one of the leading proponents of the financial modernization bill — agreed to protect the privacy of consumers in Germany by adopting a true consent policy with respect to disclosure of their personal information. However, Citibank offers no such protection to Americans. Citibank's Agreement on Inter-territorial Data Protection, which governs the sharing of personal financial information between Citibank and its German credit card servicing affiliates, indicates that personal financial information provided by the affiliates would not be shared with third parties without express consent of the German consumers.

As Senator Shelby put it during the debate on G-L-B, "Now, if they can offer financial privacy to individuals in Germany, why on God's green Earth can't they agree to an opt-in here in America? Do Germans have special rights over Americans?" I would expect this argument to gain prominence. The same objection is being made to the Clinton Administration's proposal to implement the European Union's data privacy initiative by giving Europeans more privacy rights than are given Americans, across the board.

Incidentally, the Federal Communications Commission successfully applies a true consent rule for dissemination of personal account transaction information by telephone companies.[11] As a result, Bell Atlantic, for example, tells its customers, "We understand that privacy is very important to all of our customers. So unless we have your permission, Bell Atlantic does not share information about your account — not even with our affiliates, such as Bell Atlantic Mobile and Bell Atlantic Internet. . .. When we ask your permission, we hope you'll give us the opportunity to help you make the most

[11] *See* Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 63 Fed. Reg. 20, 326 (1998); *see, e.g.*, U.S. West, Inc. v. FCC and USA, 182 F. 3d 1224 (10th Cir. 1999).

informed choices about your telephone needs." That privacy policy is like a breath of fresh air.

V. IMPLEMENTATION OF THE PRIVACY PROTECTIONS IN THE G-L-B

In looking at the implementation of G-L-B, I thought that examining an existing privacy policy to see how it might be affected, and how it *should* be affected by a financial privacy rule might be useful. I do not mean to pick on one corporation, but let's use Citibank as an example.

Here are some excerpts from its current, pre-G-L-B privacy policy:

> We will safeguard, according to strict standards of security and confidentiality, any information you share with us.[12]

That sounds nice, but must have been written by a lawyer. It is absolutely true, I am sure. But, it is also absolutely meaningless. What, precisely, are the "strict standards of security and confidentiality" that Citicorp uses to protect information shared with it?

> We will limit the collection and use of any such information to the minimum we require in order to deliver you superior service, which includes advising you about our products, services and other opportunities, and to administer our business.[13]

What does this mean? What information is being collected? How is it being used? Does the phrase "administering our business" include using information furnished to one affiliated entity — such as

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[12] Citicorp's privacy policy *available at* http://www.citibank.com/privacy/ (last visited Mar. 7, 2001).

[13] *Id.*

a credit card servicing affiliate — to deny services[14] that could be offered by another affiliated company, such as a life insurance company? The privacy policy continues:

> We will always maintain control over the confidentiality of your information. We will, however, facilitate relevant marketing and promotional offers from reputable companies that meet your needs. The companies are not permitted to retain any of your information unless you have specifically expressed interest in their products or services.[15]

This does not provide much protection at all. Citibank implicitly asserts the authority to decide without any outside input what a "reputable company" is and what "my needs" are. While, hearing that these unnamed "reputable" companies are not permitted to retain any of the unspecified information may seem comforting, what if they do? There is no remedy for the consumer in this policy. The policy also invites the consumer to go through his or her billing statement and write or call Citibank to become excluded from these offers. Citibank's privacy policy continues:

> To alert you to special offers and provide you with products and services that are tailored specifically to you, our affiliates share information about you on a confidential basis. Our affiliates are permitted by law to share any information about their transactions or experiences with you.[16]

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[14] ACLU and other civil libertarians expressed much more concern about the denial of services based on unauthorized sharing of sensitive personal financial information that was submitted in confidence, and about the basic privacy interest in controlling dissemination of that information, than about the marketing of inferior or over-priced products. Marketing is commercial speech, and to such speech we say: "Bring it on!"

[15] *See* Citicorp's privacy policy, *supra* note 13.

[16] *Id.*

This sounds like the part of G-L-B Act, which Representative Dingell must have been referring to as the "we're going to stick it to you" part. If affiliates share information about a consumer, that information is not "confidential." Well, maybe it is confidential in the sense that it is kept secret from consumer! Moreover, most consumers do not really know what "information about transactions or experiences" really means. If a consumer was told that named Citicorp affiliates will share the consumer's Certificates of Deposit due dates and values, checking account balances, the amount of money in their IRA account, the amount of the loan on their house and the monthly payment, their credit card balances and purchases by category of product or service, information about their large deposits or withdrawals, and the amount of life insurance they have, then this disclosure would be much more meaningful to the consumer, and troubling. Moreover, this form of disclosure would make the sharing of such personal financial information much less likely.

These examples point out the deficiencies in the privacy policies that financial institutions have already voluntarily adopted. We are hopeful that the regulations, that are eventually promulgated to implement the privacy provisions in the G-L-B legislation, will not permit such vague statements and promises; but, will instead afford consumers meaningful notice about what information is collected, how their personal financial information will be shared, and what they can do to control such sharing.

VI. PROSPECTS FOR ADDITIONAL PRIVACY LEGISLATION

The Gramm-Leach-Bliley Act is incomplete because it fails to require true consent for dissemination of personal information to non-affiliated companies, and does not allow a consumer to block the sharing of personal information among affiliates. In addition, the required privacy policy disclosures may well prove insufficient. For these reasons, legislation has been introduced to remedy the perceived defects. The leading bill in the 106th Congress, the Consumer's Right

to Financial Privacy Act (CRFP),[17] introduced by Reps. Edward Markey (D-MA) and Joe Barton (R-TX) in the House, and Sens. Richard Shelby (R-AL) and Richard Bryan (D-NV), would provide for true consent for the sharing of personal financial information among affiliates and non-affiliated companies. However, this legislation, like G-L-B itself, lacks an adequate enforcement mechanism. The CRFP does not explicitly allow a person who is wronged by the sharing of their personal financial information to bring suit independently and collect actual or liquidated damages and attorney's fees. Instead, the legislation relies on the Federal Trade Commission and state law enforcement officials to ensure compliance. This is inconsistent with other federal privacy statutes, such as the Driver's Privacy Protection Act[18] and the Video Privacy Protection Act, both of which provide for a private right of action.[19]

Four things could work to spur financial privacy legislation as the year winds down. First, the Administration is reportedly almost ready to propose its own financial privacy bill. Proposed legislation from the Clinton Administration would increase the visibility of the issue, especially if the President chooses to take to the bully pulpit on privacy. Second, state-based enforcement and legislative initiatives could drive even some financial institutions to ask Congress to re-visit the issue, and possibly occupy the field so as to pre-empt more protective state laws. Financial privacy bills have been proposed in the legislatures of 17 states. Certainty, clarity and consistency are valuable to large financial institutions, and may, in some circumstances, outweigh the business advantage of using a consumer's financial information to market or deny services. Indeed, in retrospect, the non-preemption amendment, which Senator Bryan offered in the conference committee, to preserve the right of states to add privacy protections to privacy floor established in G-L-B bill, may prove even more important than the "opt-out" for sharing with third parties. The ACLU National Office has drafted and distributed to its affiliates and coalition partners a "model" state-level financial

[17] H.R. 3320 and S. 1903.
[18] 18 U.S.C. § 2721-5 (1999).
[19] 18 U.S.C. § 2710 (1999).

privacy bill; we've urged activists around the country to attempt to usher through such legislation this year. Third, a widely reported privacy abuse by a large financial institution could spur financial privacy legislation. Fourth, the upcoming elections are a potential wildcard. Opinion polls indicate that privacy — especially financial privacy and medical records privacy — are two of the issues that voters care deeply about. The polls also suggest that informational privacy, as against business interests, is of even greater concern than information privacy as against governmental intrusion. If one presidential candidate were to seize the privacy mantle, it could become a potent political issue. However, neither of the leading presidential candidates seems well-positioned to do that

CONCLUSION*

The quest for financial privacy is not a journey that will soon end. For so long as Americans believe that their account balances and transactions are personal information, this debate will continue, and will occasionally flare up. To many, maintaining the privacy of the intimate details of their lives is the essence of the struggle for human dignity. We will continue with our efforts to promote reasonable protections for sensitive personal information.

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* *Editor's note:* No additional financial privacy legislation was enacted in the 106th Congress, which ended in November 2001. However, additional financial privacy legislation is pending in the 107th Congress. *See* Financial Privacy Protection Act 2001 S. 450, 107th Cong. (2001).